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No. _____

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

THE STATE OF WASHINGTON,

Cross-Petitioner,

v.

ASSOCIATED GROCERS, INC.,

Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTION PRESENTED

Can the Washington Supreme Court properly use the Equal Protection Clause of the Fourteenth Amendment to invalidate a tax exemption available to retailers, who make internal distributions, but not to wholesalers, without examining whether there is a rational basis for taxing retailers and wholesalers differently?

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CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Cross-petitioner, the State of Washington, respectfully prays that a writ of certiorari issue to review a decision of the Supreme Court of Washington. The Washington Supreme Court found that a tax exemption which is available to retailers distributing to their own outlets, but not available to wholesalers, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The court made this ruling without examining whether a rational basis exists for the differing treatment. Associated Grocers has filed a petition for writ of certiorari seeking review of the remedial portion of the court's decision, which denied retroactive relief.

Associated Grocers claims that the Washington court's refusal to provide retroactive relief was erroneous. The State of Washington is filing this counter-petition because the Washington Supreme Court's conclusion deny-

ing relief was correct in that the exemption in controversy is not invalid under proper equal protection analysis. Therefore, Associated Grocers is not entitled to a refund or other form of retroactive relief. This cross-petition may also be necessary to preserve arguments the State will make in response to Associated Grocers' petition.[1]

OPINIONS BELOW

The opinion of the Washington State Supreme Court is reported as *Associated Grocers, Inc. v. State*, 114 Wash.2d 182, 787 P.2d 22 (1990), and is reproduced as Appendix A to Associated Grocers' petition. The unpublished memorandum opinion of the trial court dated March 19, 1988, is reproduced as Appendix B to Associated Grocers' petition. The unpublished trial court order holding part of the Washington business and occupation tax unconstitutional is reproduced as Appendix C to Associated Grocers' petition. The trial court's unpublished order granting Associated Grocers a refund of tax is reproduced as Appendix D to Associated Grocers' petition. The Washington Supreme Court's unpublished order denying both parties' motions for reconsideration is reproduced as Appendix E to Associated Grocers' petition.

JURISDICTION

The Washington Supreme Court's opinion in the case was entered on March 1, 1990. Timely motions for reconsideration by the State of Washington and Associated Grocers were both denied on May 17, 1990. Associated Grocers filed a petition for writ of certiorari to the Supreme Court of the State of Washington which was received by the State of Washington on August 16, 1990. The State of Washington is bringing a cross-petition for a writ of certiorari under Rule 12.3. The Court has jurisdiction to review the

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[1]*See United States v. ITT Continental Baking Co.*, 420 U.S. 223, 226-27 n.2 (1975); *Strunk v. United States*, 412 U.S. 434 (1973); *Labor Board v. International Van Lines*, 409 U.S. 48, 52 n.4 (1972).

Washington State Supreme Court's opinion by writ of certiorari under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Wash. Rev. Code §§ 82.04.050, 82.04.060, 82.04.250, and 82.04.270 are set forth in the Appendix to the State of Washington's cross-petition for writ of certiorari.

STATEMENT

I. OPERATION OF WASHINGTON TAX SYSTEM.

Washington imposes business and occupation (B&O) tax on the activities of making wholesale or retail sales. Wash. Rev. Code §§ 82.04.270(1), 82.04.250. A wholesale sale is a sale for resale either to another wholesaler or a retailer. Wash. Rev. Code § 82.04.060. On the other hand, a retail sale is a sale to a consumer. That is, a sale that is not for resale. Wash. Rev. Code § 82.04.050.

Both the wholesale and retail B&O taxes are measured by the gross proceeds of sales. The basic rate of both taxes is .0044. Wash. Rev. Code §§ 82.04.270(1), 82.04.250. Thus, the wholesale B&O tax on a sale of $1,000 is $4.40 ($1,000 x .0044). The B&O tax on a retail sale of $1,000 would also be $4.40.

At various times, including the present,[2] Washington has imposed an additional B&O tax on retailers, with two or more retail outlets, who make internal distributions. Wash. Rev. Code § 82.04.270(2). An internal distribution is

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[2]A tax on retailers distributing to two or more of their own retail outlets was first passed in 1935. Wash. Laws 1935, c. 140 § 4. In 1941 the tax was removed and retailers were not subject to the additional tax on distribution until 1955. Wash. Laws 1941, c. 178 § 1. A tax on retailer distribution was passed again in 1955. Wash. Laws 1955, c. 389 § 47. Within four years, in 1959, the Legislature modified the tax to relieve retailers of this additional distribution tax if they purchased the goods from a wholesaler who had already paid wholesale tax on the items. This version of the statute is still in effect. Wash. Laws 1959, Ex. Sess. c. 5 § 3.

not a sale. It occurs when a retail business distributes merchandise from its own warehouse to one of its retail outlets. The measure of this additional tax is the value of the articles distributed. The basic rate is .0044. *Id.* Thus, if a retailer distributes goods valued at $1,000 from a warehouse to its retail outlet, the additional internal distribution tax is $4.40. This tax is imposed on top of the retail B&O tax of $4.40 that the business pays when it sells the goods for $1,000. Thus, the total tax on the retailer for the $1,000 of goods—distributed and sold—is $8.80.

Washington relieves the retailer of the additional tax on internal distributions if the retailer purchases property from a wholesaler who has paid the wholesale B&O tax. Wash. Rev. Code § 82.04.270(2). However, this exemption does not apply to the tax imposed on the retail sale. The retailer is always subject to the B&O tax on a retail sale of the goods.

Wholesalers are not subject to the tax on internal distributions, nor are they given the previously described exemption that relieves the tax on some internal distributions. Just as the retail seller is always subject to retail B&O tax, the wholesale seller is always subject to tax on its wholesale sales. As with the retail seller, the wholesale seller is not relieved of its wholesale B&O tax obligations simply because it has purchased goods from another wholesaler who has paid wholesale B&O tax.

II. OPERATION OF THE TAX IN THIS CASE.

Associated Grocers brought this action for refund of B&O taxes in 1985 after having paid under this tax structure without challenge since its adoption in 1959. Associated Grocers is exclusively a wholesaler of grocery products taxable on its wholesale sales. Its customers are independent retail grocery stores. Associated Grocers is not subject to any additional tax on internal distributions.

Safeway, a large chain grocery store operation, is not a party to this case, although it did appear as *amicus curiae* before the Washington State Supreme Court. Safeway

has been used as an example of a retailer engaged in internal distribution in the grocery industry. Contrary to the assertion by Associated Grocers, internal distributors, like Safeway, are not in competition with wholesalers. They do not solicit retail customers or make wholesale sales. They simply distribute merchandise to their own stores. Competition does exist between retailers engaged in internal distribution and retail customers of wholesalers. The retail customers of Associated Grocers are not parties to this litigation.

Associated Grocers brought the present suit for a refund of wholesaling B&O taxes paid since January 1, 1981, arguing that the exemption in Wash. Rev. Code § 82.04.270(2) relieving retailers from the tax on internal distribution was discriminatory. Associated Grocers wanted the exemption to apply to wholesalers purchasing items from other wholesalers who had already paid a wholesale tax on the merchandise even though they were not subject to a tax on internal distribution. Under such a tax structure Associated Grocers, as a wholesaler, would pay no B&O tax at all on items to which the exemption applied. Retailers, like Safeway, on the other hand, would still be liable for the retail B&O tax even if they were relieved from the additional tax on internal distributions. The amount of tax in controversy for Associated Grocers alone is in excess of $9 million.

III. DECISION BELOW.

At both the trial court and the State Supreme Court level the parties agreed that Wash. Rev. Code § 82.04.270 was an economic regulation and therefore properly subject to minimal scrutiny equal protection analysis. Associated Grocers argued that equal protection was denied because members of an alleged single taxpayer class were treated differently. The State argued throughout that the pertinent inquiry was whether a rational basis existed for the differing treatment of retailers performing internal distri-

bution and wholesalers.[3] The majority opinion of the Washington Supreme Court adopts the position of Associated Grocers and finds a violation of equal protection merely because members of what it concludes was one taxpayer class were treated differently.

The Washington Supreme Court invalidated the exemption extended to internal distributors under RCW 82.04.270(2) without ever engaging in any analysis of whether or not there was a rational basis for the Legislature's differing treatment of wholesalers and retailers. The court rejected rationality review and substituted one prong of a three-part test that did not require examination of the legislative purpose:

> Using this test the court makes three inquiries: (1) whether the classification applies alike to all members within the designated class; (2) whether some basis in reality exists for reasonably distinguishing between those within and without the class; and, (3) whether the challenged classification bears any rational relation to the purposes of the challenged statute. *Yakima County Deputy Sheriff's Assn. v. Board of Commissioners*, 92 Wash.2d 831, 835-836, 601 P.2d 936 (1979), *appeal dismissed*, 446 U.S. 979 (1980).

The court used the first prong of this test to invalidate the legislative action at issue in the case. The court summarily concluded that the Legislature created a single class of taxpayers and then treated them differently. This ended the court's inquiry into the legitimacy of the legisla-

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[3]The State objected to analysis which stopped with the mere conclusion that a single class existed rather than examining the rationality of the differing treatment provided under the statute:

> Such an approach avoids any meaningful analysis of the legislative classification inescapably presented by the statute. The real issue for resolution is not whether the legislature created two classes, clearly they did. One class is taxed on all wholesale sales, the other is not taxed if the exemption applies. The real legal issue presented is whether or not treating wholesalers and retailers performing wholesale functions differently was based on actual differences between them and was reasonably related to a legitimate legislative purpose.

(Brief of Appellant p. 12).

tive classification. The court specifically refused to engage in any further analysis which would examine the rationality of the differing treatment stating:

> Where, as here, there is but one class, and the members of it are taxed differently, the statute must be declared unconstitutional. It is not necessary to consider the second and third inquiries under the *Yakima County* test.

Associated Grocers, 114 Wash.2d at 188, 787 P.2d at 25 (Pet. 6a).

The dissenting opinion rejected this single class characterization of the statute stating:

> This conclusion stems from the majority's erroneous assumption that the Legislature intended to treat distributors and wholesalers under the statute as members of the same taxpaying class.

Associated Grocers, 114 Wash.2d at 192, 787 P.2d at 27 (Pet. 10a). The dissent then went on to analyze the rationality of the differing treatment afforded wholesalers and retailers. It found that extending the exemption only to retailers was a rational attempt to address a particular aspect of competition at the retail level.[4] The majority opinion failed to engage in this rational basis inquiry so necessary to proper equal protection analysis.

REASONS WHY WRIT SHOULD BE GRANTED

I. THE STATE SUPREME COURT'S REFUSAL TO EXAMINE THE RATIONALITY OF THE LEGISLATURE'S CLASSIFICATION CONFLICTS WITH THIS COURT'S EQUAL PROTECTION PRECEDENTS.

The Washington Supreme Court's approach to equal protection is contrary to this Court's precedents because it

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[4]Even the dissenting opinion purports to apply the three-part test of *Yakima County*. The dissent ultimately reached the proper rationality issue by moving to the third inquiry under the test. While its result in this case is more appropriate, the defective approach is still fraught with uncertainty and potential for incorrect results.

fails to require examination of the rationality of differing treatment. This Court has identified mere rationality as the proper inquiry in economic regulation cases. The Washington court's three-part test is a marked departure from this controlling Fourteenth Amendment authority.[5]

The decisions of this Court in economic regulation cases have turned on whether there was a rational basis for a legislative classification. This Court has not used a three-part test and has consistently focused on the existence of any conceivable rational basis for differing treatment under a challenged statute. *United States v. Sperry Corp.*, 110 S. Ct. 387 (1990); *Amerada Hess v. New Jersey Taxation Division*, 109 S. Ct. 1617 (1989); *City of Dallas v. Stanglin*, 109 S. Ct. 1591 (1989); *United States Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980); *McGowan v. Maryland*, 366 U.S. 420 (1961).

This Court's test for any legitimate rational basis under minimal scrutiny equal protection analysis gives great deference to legislative decisions in the economic arena. This Court's cases acknowledge that any conceivable purpose can be used to uphold a legislative classification. "[W]e will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 462-63 (1988) (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979)).

This Court has also established that if a rational basis for legislative action exists it need not have been the basis which actually motivated the legislature. In *United States Railroad Retirement Board v. Fritz*, this Court stated:

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[5]There is no evidence or claim that the Washington court was deciding the case on independent state grounds. *Michigan v. Long*, 463 U.S. 1032 (1983). The petition of Associated Grocers also frames the question in terms of the Fourteenth Amendment to the United States Constitution.

> Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," Flemming v. Nestor, 363 U.S. at 612, because this court has never insisted that a legislative body articulate its reasons for enacting a statute.

449 U.S. at 179.

The Washington Supreme Court's "single class" method for analyzing equal protection issues conflicts with these Supreme Court rulings. By focusing solely on the conclusion that a single taxpaying class was created, even though separate taxes were assessed against two types of businesses, the court fails to give any consideration to the proper rationality inquiry mandated by these cases.[6]

The Washington Supreme Court's test of whether the classification applies alike to all members within the designated class is invalid because every statute necessarily applies equally to all to whom it applies. Such an inquiry is trivial and empty of content and is wholly improper when used to strike down a piece of legislation. This Washington test should not be allowed as an alternate form of equal protection analysis because it has no standards for its application and provides no guidance or predictability to the legislature or litigants.

The State of Washington's position that the equal protection test used by the Washington State Supreme Court is erroneous is not simply an exercise in semantics. A test

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[6]Petitioners, Associated Grocers, point to *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 109 S.Ct. 633 (1989) as support for a "single class" analysis for equal protection inquiry. This reference is misplaced. The decision recognized the state's broad power to make different tax classifications "if the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy * * *" *Allegheny*, 109 S.Ct. at 638 (citing *Brown-Forman Co. v. Kentucky*, 217 U.S. 563, 573 (1910)). The statutory framework at issue classified the taxpayers in question the same. No differing statutory treatment existed. The county assessor, however, was applying the statute differently to separate taxpayers. The Court specifically refused to consider the validity of separate treatment under a statutory enactment since it was not present in the case. The current case does not involve an "as applied" challenge to the Washington tax, but a facial finding of invalidity.

which strikes down a legislative action without examining its rationality not only improperly diverts attention from the true inquiry but also results in decisions striking down enactments that would be upheld under proper application of this Court's precedents.

II. APPLICATION OF THE WASHINGTON COURT'S INVALID TEST FOR EQUAL PROTECTION VIOLATION RESULTS IN STRIKING DOWN CLASSIFICATIONS THAT WOULD BE UPHELD UNDER PROPER RATIONAL BASIS ANALYSIS.

The decisions of this Court have consistently upheld legislation if it is not inconsistent with any conceivable legitimate legislative purpose. This very deferential standard of review applied in the area of economic regulation acknowledges a broad range of appropriate legislative discretion in taxation issues. The Washington court's single inquiry into whether a classification applies alike to all members within the designated class fails to provide this deference to legislative authority. The very real danger in using the Washington test is that it can invalidate classifications that would be upheld under required rational basis analysis. The case in controversy is a good example of this problem. Without the benefit of any meaningful analysis the Washington Supreme Court concluded that a single taxpayer classification was created by the statutory enactment of Wash. Rev. Code § 82.04.270 and that since members of the class were taxed differently the statute was therefore unconstitutional.[7]

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[7]Interestingly, in the single paragraph addressing legislative intent the court noted that the language of the statute "expresses an intent to assure that the tax is identical for both *subclasses within the class*." (Emphasis supplied). *Associated Grocers*, 114 Wash. 2d at 187, 787 P.2d at 25 (Pet. 6a). Even in applying its own summary test regarding the makeup of a class the court recognized that two groups were created which it referred to as "subclasses." When two groups are treated differently, the proper equal protection inquiry is whether there is a rational basis for such differing treatment.

The dissenting opinion in *Associated Grocers* did properly engage in a rational basis analysis. The dissent concluded that a rational basis does exist for the differing treatment of retailers and wholesalers under Wash. Rev. Code § 82.04.270. The dissent found that the Legislature was implementing a legitimate legislative purpose to address a particular aspect of competition at the retail level. Under this Court's controlling precedents a legitimate purpose for the enactment is all that is required for its constitutional validity. By failing to engage in this type of inquiry the majority of the Washington State Supreme Court reached the wrong result. In this case it invalidated a statute that taxes retailers and wholesalers differently even though a rational basis existed for the different treatment. Because the majority's "single class" test can, and did, reach a result contrary to rational basis analysis, it should not be allowed to stand.

CONCLUSION

The Washington State Supreme Court ruled that an exemption provided to retailers distributing to their own outlets and not to wholesalers violated the Equal Protection Clause of the United States Constitution. Its decision did not provide retroactive relief for Associated Grocers. Associated Grocers has therefore filed a petition for writ of certiorari seeking revision of this remedial ruling. The State of Washington contends that the Washington court's failure to provide retroactive relief was appropriate because the statutory exemption was constitutional. The State has filed a cross-petition for writ of certiorari in support of this position asking this Court to invalidate the three-part test used by the Washington State Supreme Court for determining an equal protection violation and to overturn its equal protection holding.

The Washington court's test of whether the classification applies alike to all members within the designated class is in conflict with the controlling equal protection analysis identified in this Court's decisions. It is seriously

flawed by its failure to address the rationality of legislative classifications. It is devoid of substantive constitutional meaning and results in striking down classifications that should properly be upheld.

Accordingly, the State has petitioned this Court for a writ of certiorari. Because the Washington court's decision so clearly deviates from accepted equal protection jurisprudence, the Court may wish to consider summary disposition of the matter.

DATED this 14th day of September, 1990.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Fourteenth Amendment

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

Revised Code of Washington:

82.04.050 (1) "Sale at retail" or "retail sale" means every sale of tangible personal property (including articles produced, fabricated, or imprinted) to all persons irrespective of the nature of their business and including, among others, without limiting the scope hereof, persons who install, repair, clean, alter, improve, construct, or decorate real or personal property of or for consumers other than a sale to a person who (a) purchases for the purpose of resale as tangible personal property in the regular course of business without intervening use by such person, or (b) installs, repairs, cleans, alters, imprints, improves, constructs, or decorates real or personal property of or for consumers, if such tangible personal property becomes an ingredient or component of such real or personal property without intervening use by such person, or (c) purchases for the purpose of consuming the property purchased in producing for sale a new article of tangible personal property or substance, of which such property becomes an ingredient or component or is a chemical used in processing, when the primary purpose of such chemical is to create a chemical reaction directly through contact with an ingredient of a new article being produced for sale, or (d) purchases for the purpose of

consuming the property purchased in producing ferrosilicon which is subsequently used in producing magnesium for sale, if the primary purpose of such property is to create a chemical reaction directly through contact with an ingredient of ferrosilicon, or (e) purchases for the purpose of providing the property to consumers as part of competitive telephone service, as defined in RCW 82.04.065. The term shall include every sale of tangible personal property which is used or consumed or to be used or consumed in the performance of any activity classified as a "sale at retail" or "retail sale" even though such property is resold or utilized as provided in (a), (b), (c), (d), or (e) above following such use. The term also means every sale of tangible personal property to persons engaged in any business which is taxable under RCW 82.04.280, subsections (2) and (7) and RCW 82.04.290.

(2) The term "sale at retail" or "retail sale" shall include the sale of or charge made for tangible personal property consumed and/or for labor and services rendered in respect to the following: (a) The installing, repairing, cleaning, altering, imprinting, or improving of tangible personal property of or for consumers, including charges made for the mere use of facilities in respect thereto, but excluding charges made for the use of coin operated laundry facilities when such facilities are situated in an apartment house, hotel, motel, rooming house, trailer camp or tourist camp for the exclusive use of the tenants thereof, and also excluding sales of laundry service to members by nonprofit associations composed exclusively of nonprofit hospitals, and excluding services rendered in respect to live animals, birds and insects; (b) the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for consumers, including the installing or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation, and shall also include the sale of services or charges made for the clearing of land and the mov-

ing of earth excepting the mere leveling of land used in commercial farming or agriculture; (c) the charge for labor and services rendered in respect to constructing, repairing, or improving any structure upon, above, or under any real property owned by an owner who conveys the property by title, possession, or any other means to the person performing such construction, repair, or improvement for the purpose of performing such construction, repair, or improvement and the property is then reconveyed by title, possession, or any other means to the original owner; (d) the sale of or charge made for labor and services rendered in respect to the cleaning, fumigating, razing or moving of existing buildings or structures, but shall not include the charge made for janitorial services; and for purposes of this section the term "janitorial services" shall mean those cleaning and caretaking services ordinarily performed by commercial janitor service businesses including, but not limited to, wall and window washing, floor cleaning and waxing, and the cleaning in place of rugs, drapes and upholstery. The term "janitorial services" does not include painting, papering, repairing, furnace or septic tank cleaning, snow removal or sandblasting; (e) the sale of or charge made for labor and services rendered in respect to automobile towing and similar automotive transportation services, but not in respect to those required to report and pay taxes under chapter 82.16 RCW; (f) the sale of and charge made for the furnishing of lodging and all other services by a hotel, rooming house, tourist court, motel, trailer camp, and the granting of any similar license to use real property, as distinguished from the renting or leasing of real property, and it shall be presumed that the occupancy of real property for a continuous period of one month or more constitutes a rental or lease of real property and not a mere license to use or enjoy the same; (g) the sale of or charge made for tangible personal property, labor and services to persons taxable under (a), (b), (c), (d), (e), and (f) above when such sales or charges are for property, labor and services which are used or consumed in whole or in part by such persons in the

performance of any activity defined as a "sale at retail" or "retail sale" even though such property, labor and services may be resold after such use or consumption. Nothing contained in this paragraph shall be construed to modify the first paragraph of this section and nothing contained in the first paragraph of this section shall be construed to modify this paragraph.

(3) The term "sale at retail" or "retail sale" shall include the sale of or charge made for personal business or professional services including amounts designated as interest, rents, fees, admission, and other service emoluments however designated, received by persons engaging in the following business activities: (a) Amusement and recreation businesses including but not limited to golf, pool, billiards, skating, bowling, ski lifts and tows and others; (b) abstract, title insurance and escrow businesses; (c) credit bureau businesses; (d) automobile parking and storage garage businesses.

(4) The term shall also include the renting or leasing of tangible personal property to consumers.

(5) The term shall also include the providing of telephone service, as defined in RCW 82.04.065, to consumers.

(6) The term shall not include the sale of or charge made for labor and services rendered in respect to the building, repairing, or improving of any street, place, road, highway, easement, right of way, mass public transportation terminal or parking facility, bridge, tunnel, or trestle which is owned by a municipal corporation or political subdivision of the state or by the United States and which is used or to be used primarily for foot or vehicular traffic including mass transportation vehicles of any kind. The term shall also not include sales of feed, seed, seedlings, fertilizer, and spray materials to persons who participate in the federal conservation reserve program or its successor administered by the United States department of agriculture, or to persons for the purpose of producing for sale any agricultural product whatsoever, including plantation Christmas trees and milk, eggs, wool, fur, meat, honey, or other

substances obtained from animals, birds, or insects but only when such production and subsequent sale are exempt from tax under RCW 82.04.330, nor shall it include sales of chemical sprays or washes to persons for the purpose of post-harvest treatment of fruit for the prevention of scald, fungus, mold, or decay.

(7) The term shall not include the sale of or charge made for labor and services rendered in respect to the constructing, repairing, decorating, or improving of new or existing buildings or other structures under, upon, or above real property of or for the united States, any instrumentality thereof, or a county or city housing authority created pursuant to chapter 35.82 RCW, including the installing, or attaching of any article of tangible personal property therein or thereto, whether or not such personal property becomes a part of the realty by virtue of installation. Nor shall the term include the sale of services or charges made for the clearing of land and the moving of earth of or for the United States, any instrumentality thereof, or a county or city housing authority.

82.04.060 "Sale at wholesale" or "wholesale sale" means any sale of tangible personal property, or any sale of telephone service as defined in RCW 82.04.065, which is not a sale at retail and means any charge made for labor and services rendered for persons who are not consumers, in respect to real or personal property, if such charge is expressly defined as a retail sale by RCW 82.04.050 when rendered to or for consumers: *Provided*, That the term "real or personal property" as used in this section shall not include any natural products named in RCW 82.04.100.

82.04.250 Upon every person except persons taxable under RCW 82.04.260(8) engaging within this state in the business of making sales at retail, as to such persons, the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the business, multiplied by the rate of forty-four one-hundredths of one percent.

82.04.270 (1) Upon every person except persons taxable under subsections (1) or (8) of RCW 82.04.260 engag-

ing within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of forty-four one-hundredths of one percent.

(2) The tax imposed by this section is levied and shall be collected from every person engaged in the business of distributing in this state articles of tangible personal property, owned by them from their own warehouse or other central location in this state to two or more of their own retail stores or outlets, where no change of title or ownership occurs, the intent hereof being to impose a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales: *Provided*, That the tax designated in this section may not be assessed twice to the same person for the same article. The amount of the tax as to such persons shall be computed by multiplying forty-four one-hundredths of one percent of the value of the article so distributed as of the time of such distribution: *Provided*, That persons engaged in the activities described in this subsection shall not be liable for the tax imposed if by proper invoice it can be shown that they have purchased such property from a wholesaler who has paid a business and occupation tax to the state upon the same articles. This proviso shall not apply to purchases from manufacturers as defined in RCW 82.04.110. The department of revenue shall prescribe uniform and equitable rules for the purpose of ascertaining such value, which value shall correspond as nearly as possible to the gross proceeds from sales at wholesale in this state of similar articles of like quality and character, and in similar quantities by other taxpayers: *Provided further*, That delivery trucks or vans will not under the purposes of this section be considered to be retail stores or outlets.

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No. 90-465

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

THE STATE OF WASHINGTON,
Cross-Petitioner,

v.

ASSOCIATED GROCERS, INC.,
Cross-Respondent.

On Cross-Petition for a Writ of Certiorari to the Supreme Court of the State of Washington

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

INTRODUCTION

The Washington Supreme Court ruled that Section 82.04.270 of the Revised Code of Washington discriminated against petitioner in violation of the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of the State Constitution by granting a tax exemption to petitioner's competitors that was not granted to petitioner. The state court nevertheless ruled, shortly before this Court's decision in *McKesson Corp. v. Division of Alcoholic Beverages*, No. 88-192, 110 S. Ct. 2238 (June 7, 1990), that petitioner was not entitled to a refund or other retrospective relief but that "the proper remedy consists solely of striking the offending tax exemption." Pet. App. 2a.[1]

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[1] Pet. App. refers to the appendix to the petition for writ of certiorari in No. 90-281.

We showed in our petition, No. 90-281, that the state court's ruling on remedy was flatly inconsistent with *McKesson* and the cases on which it was based, and we suggested that the Court may wish to consider a summary remand to allow the Washington Supreme Court to reconsider its ruling on remedy in light of that case. The respondent and cross-petitioner, the State of Washington, has not filed a brief in opposition or, indeed, made any response whatever with respect to the question presented in the petition. Instead, the state has filed a cross-petition under Rule 12.3 of this Court attacking (although it did not choose to do so by a timely petition of its own) the state court's decision striking down the discriminatory provision.

The cross-petition presents no issue worthy of this Court's review. The statute discriminated between taxpayers who compete with each other in the very activity that is the subject of the discriminatory tax. The state trial court explicitly found "that there is *no rational relationship* between the obvious discrimination against wholesalers and the explicit statement of legislative purpose" (Pet. App. 26a) (emphasis supplied). The Washington Supreme Court put the matter in somewhat different terms but the gist of its ruling, too, was that the statutory discrimination made no sense in light of the state legislature's purpose as repeatedly interpreted by that court.

STATEMENT

The material facts, which "are not in dispute" (Pet. App. 2a), and the procedural history of this case are set forth in our petition. The respondent and cross-petitioner has, however, attempted to sow confusion by repeatedly referring to petitioner's competitors as "retailers" (instead of "distributors," the term used in the statute and by the Washington Supreme Court) and by discussing a different tax provision, Wash. Rev. Code § 82.04.250,

which is not involved in this case and has no important bearing on the present issues.

The cross-petition discusses two different business and occupation taxes which are imposed by two different Washington statutes. Section 82.04.270, the provision involved in this case, is entitled **"Tax on wholesalers, distributors."** Pet. App. 39a. It imposes a tax both on wholesalers and on "distributors": firms that engage in the same function as wholesalers—distributing goods *to* retail outlets—but whose distribution does not involve any sale because the retail outlets happen to be owned by the distributor. The statute itself states the intent to impose—

> a tax equal to the wholesaler's tax upon persons performing functions essentially comparable to those of a wholesaler, but not actually making sales.[2]

Pet. App. 39a. The other tax provision, Section 82.04.250, which is not involved in this case, imposes a separate tax on retail sales.

Petitioner engages only in wholesaling and pays only the tax under Section 270. Petitioner's customers, who are retailers, pay a separate tax on their retail sales under Section 250. Safeway, the firm used throughout this litigation as a contrasting example, is a vertically integrated business that both performs wholesale distribution functions and is a retailer. It competes both with petitioner and with petitioner's customers.[3] Since

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[2] This express declaration of legislative purpose is never even acknowledged in the State's cross-petition.

[3] Respondent's assertion (Cross Pet. 5) that "internal distributors, like Safeway, are not in competition with wholesalers [like petitioner]" was rejected by both state courts. See Pet. App. 2a ("Safeway . . . a competitor of [petitioner]"); Pet. App. 19a ("Safeway . . . is a competitor of [petitioner]").

it engages in both of the taxed activities (wholesale distribution and retailing), it is subject to both taxes.

Cross-petitioner's assertion (Cross Pet. 3) that Section 270, the Section at issue, imposes "an additional B&O tax on retailers" is an attempt either to confuse or to quarrel with the state statutory scheme as explicated by the state's own courts. It is clear and well established that the state statutory scheme imposes two taxes on an entity that is engaged in *both* the taxable activity of performing wholesale functions *and* the separate taxable activity of retailing. *Air-Mac, Inc. v. State*, 78 Wn.2d 319, 474 P.2d 261 (1970). But contrary to the cross-petitioner's assertion, in that situation the Section 270 tax "is not imposed on the store or [retail] outlet, but upon the wholesaling function, that is, the *distribution* to two or more [retail] outlets." *Standard Oil Co. v. State*, 57 Wn.2d 56, 62, 355 P.2d 349, 353 (1960) (emphasis in original).

ARGUMENT

The cross petition presents no question warranting this Court's review. The state courts of Washington, including the state's highest court, first determined the intentions of the Washington legislature in enacting Section 270; on that matter, the Washington Supreme Court is, of course, the final authority. Having made that determination, the state courts then ruled that the discriminatory feature of Section 270, the exemption of distributors but not wholesalers from tax on their distribution of goods acquired from a tax-paying wholesale supplier, not only did not in any way serve but actually contravened the legislature's purpose, and was therefore a discrimination that could not survive even the lowest level of scrutiny under the Equal Protection Clause. That decision, grounded in the state courts' interpretation of the state legislature's purposes in this particular statute, was correct and raises no issues of general importance.

The test set forth by this Court is "whether . . . the legislative classification is rationally related to achievement of the statutory purposes." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 (1981). The tax exemption at issue in this case fails that test, and notwithstanding cross-petitioner's effort to build an issue out of the way the Washington Supreme Court's opinion was crafted, that *is* what both the trial court and the Washington Supreme Court held.

The trial court was explicit:

> From the language of the statute itself and from the opinions of the appellate courts of this state construing this statute, it is absolutely clear that the purpose of the statute is to tax the two classes equally to neutralize any advantage inherent in organizations which have integrated the wholesaling functions into their operation.[4]
>
> * * * *
>
> In this case I find that there is no rational relationship between the obvious discrimination against wholesalers and the explicit statement of legislative purpose of equalizing taxes. Such discrimination is clearly contrary to the legislative purpose and appears to be the result of legislative oversight.

Pet. App. 26a.

The Washington Supreme Court was equally explicit about purpose:

> [S]ubsection (2) [of Section 270] announces a legislative intent "to impose a tax equal to the wholesaler's tax upon persons performing functions essen-

[4] The trial court found that Section 270 created one class of taxpayers including both wholesalers and others who perform wholesale functions (Pet. App. 22a). The mention of "two classes" in this passage was part of a further finding that, assuming arguendo that wholesalers and such distributors might be regarded as separate classes, there was no rational basis for distinguishing between them.

> tially comparable to those of a wholesaler." This expresses an intent to assure that the tax is identical for both subclasses within the class.

Pet. App. 6a. The Washington Supreme Court then held that the exemption at issue, which treats the members of this single class differently, violates the Equal Protection Clause: "Where, as here, there is but one class,[5] and the members of it are taxed differently, the statute must be declared unconstitutional." *Id.*

Cross-petitioner objects to this "one-class" formulation of the issue, insisting that the court should have treated wholesalers and others who perform wholesale functions as two classes and then asked whether there was a rational basis for distinguishing between classes. But this quibble is groundless: the Washington Supreme Court, in striking down a portion of a statute enacted by the state legislature, obviously *did* mean to rule that there was no good basis, in light of the statutory purpose, for distinguishing between wholesalers and others who perform wholesale functions. The statement that wholesalers and those who perform wholesale functions are members of a single class was plainly intended to *be* a statement that there was no basis for discriminating between them.

Indeed, this Court has used the same "one-class" formulation in analyzing discriminatory tax schemes under the Equal Protection Clause:

> The Equal Protection Clause . . . protects the individual from State action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.

---

[5] This construction of the statute was already well established Washington law. "This Court has consistently treated distributors and wholesalers as members of a single class under the statute [Section 270] and its forerunners." Pet. App. 6a (citing earlier cases).

Allegheny Pittsburgh Coal Co. v. County Commissioners, 488 U.S. 336, 345 (1989), quoting *Hillsborough v. Cromwell*, 326 U.S. 620, 623 (1946). In using this formulation, the Court of course did not mean that it was irrelevant whether it was reasonable to tax A but not B; rather, the question of reasonableness was subsumed in the determination that A and B were members of a single class.

There is no reason for this Court to exercise its certiorari jurisdiction to comment on the way the Washington Supreme Court crafted its opinion. Nor is there any reason to review the Washington Supreme Court's decision on the equal protection question. That decision, which was grounded in the Washington court's longstanding interpretation of the legislative purpose embodied in a particular section of the state taxing scheme, was in essence that an unequal tax on wholesalers and others who perform wholesale functions was not "rationally related to achievement of the statutory purposes" in Section 270. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. at 463.

The issue here is *not* whether the Washington legislature could have had "any conceivable purpose" (Cross Pet. 8) for distinguishing wholesalers from distributors. Here, the Washington courts have determined the legislative purpose. There is no reason for this Court to accept cross-petitioner's invitation to wade into the state tax scheme, review the state courts' determination of the purpose of a state statute, or review the state courts' determination that, given their finding of actual purpose, the statute at issue denied equal protection to wholesalers who should have been treated equally with others who perform wholesale functions.

CONCLUSION

For the reasons stated in this brief and in our petition for a writ of certiorari, the cross-petition should be denied and the petition should be granted. The Court may wish to consider a summary remand to allow the Washington Supreme Court to reconsider its ruling on remedy in light of this Court's decision the following month in *McKesson*.

Respectfully submitted,

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Cross-Respondent.

ON CROSS-PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

CROSS-PETITIONER'S REPLY MEMORANDUM

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Associated Grocers' brief in opposition on cross-petition in No. 90-465 tries to rewrite the Washington Supreme Court opinion in this case to correspond to the proper rational basis test set forth by the State in its cross-

petition. Associated Grocers suggests for the first time in the opposing brief that the Washington Supreme Court really meant to engage in rational basis analysis in reaching its equal protection holding in this matter. While Associated Grocers' response acknowledges the propriety of the rational basis test advocated by the State, the record rebuts Associated Grocers' suggestion that the court used the proper rational basis test. Associated Grocers' improper effort to speculate about the state court's motives fails because it blatantly ignores what the court actually did.

In fact, both the trial court and the supreme court used the first prong of a three-part equal protection test[1] to conclude that the statute created only one class of taxpayers, consisting of retailers and wholesalers,[2] and that treating the two groups differently thus resulted in an equal protection violation.[3] To avoid the arguments in the cross-petition, Associated Grocers now tries to rewrite the state court decision to ignore the unmistakable language in the opinion limiting the court's analysis to the "single-class" inquiry:

> Where, as here, there is but one class, and the members of it are taxed differently, the statute must be declared unconstitutional. It is not necessary to consider the second and third inquiries under the *Yakima County* test.

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[1]The test used by the state court is enunciated in *Yakima County Deputy Sheriffs' Ass'n v. Board of Commissioners*, 92 Wash. 2d 831, 835-36, 601 P.2d 936 (1979), *appeal dismissed*, 446 U.S. 979 (1980). (Cross-Pet. p. 6)

[2]Associated Grocers alleges that the State is confusing matters by referring to internal distributors as retailers and by discussing the business and occupation tax on retailers in Wash. Rev. Code § 82.04.250. This criticism is unfounded because by definition all internal distributors are retailers distributing goods to two or more of their own retail outlets. Wash. Rev. Code § 82.04.270(2).

[3]Cross-respondent refers to competition between Safeway and Associated Grocers. (Brief in Oppos. p. 3) Since Associated Grocers is exclusively a wholesaler and Safeway makes no wholesale sales, no direct competition exists at the wholesale level. Any competition is between Safeway and the retail outlets purchasing from Associated Grocers. The issue of competition, however, is a diversion in the case because competition is not a relevant factor in evaluating whether a partial tax exemption violates the constitution. *See Pittsburgh. v. Alco Parking Corp.*, 417 U.S. 369, 376 (1974).

Associated Grocers, Inc. v. State of Washington, 114 Wash. 2d 182, 188, 787 P.2d 22 (1990). After specifically refusing to apply the proper rational basis test (the third prong of the Washington Supreme Court's equal protection test), the court moved directly to its discussion of remedies. The court's explicit refusal to consider whether the partial exemption satisfied the rational basis test was clear error. The State's cross-petition is based upon this error.

By seeking to recast the court's opinion as a form of rational basis inquiry, Associated Grocers in effect concedes that the court's "single class" equal protection analysis was improper. In fact, Associated Grocers acknowledges the rational basis test of this Court, citing *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 (1981). (Brief in Oppos. p. 5)[4]

While even Associated Grocers has now abandoned the flawed three-part *Yakima County* equal protection test, the Washington Supreme Court unfortunately has not. Despite Associated Grocers' efforts to suggest that the court *meant* to engage in some type of rational basis analysis, the court's words plainly belie any such intent. Associated Grocers' ineffectual attempt to rewrite the state court opinion to meet the rational basis test simply highlights the critical flaw in the court's decision that the cross-petition seeks to remedy.

Contrary to the speculation of Associated Grocers, there is no evidence that the Washington Supreme Court majority would have reached the same result using a proper rational basis analysis. Proper minimal scrutiny would

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[4]Associated Grocers' later reference to *Allegheny Pittsburgh Coal Co. v. County Comm'rs*, 488 U. S. 336, 345 (1989) (Brief in Oppos. pp. 6-7) as support for a "single class" analysis under this Court's precedents is misplaced. *Allegheny* addressed only discriminatory *application* of a single tax classification. It did not deal with the legislative power to classify taxpayers which is at issue in the present case.

involve examination of any conceivable purpose supporting the legislative classification.[5]

The record, however, does reveal that when the dissenting justices in this case employed a proper rational basis analysis, they found a legitimate purpose supporting the exemption as written. (*Associated Grocers*, 114 Wash. 2d at 195-97, Pet. 16a) This demonstrates that the Washington Supreme Court likely would have reached a different result if it had applied a proper equal protection analysis.

Far from being a minor squabble over a state tax scheme, as Associated Grocers would like to characterize this matter, the State of Washington's cross-petition raises an important federal constitutional issue. By declaring a statutory classification unconstitutional without considering any rational basis for the classification, the Washington Supreme Court committed a fundamental error in equal protection analysis. This error must be corrected not only to reverse the result in this case but also to avoid additional erroneous decisions in the future.

CONCLUSION

The State has demonstrated that any legitimate equal protection analysis must include a rational basis inquiry. The cross-respondent has acknowledged this standard by arguing that the Washington Supreme Court's opinion actually *meant* to engage in such a rational basis inquiry. Since the court's opinion unmistakably contradicts that assertion, the State asks that its cross-petition for certiorari be granted. The Court may wish to consider

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[5]The suggestion by Associated Grocers that only the enunciated purpose can be considered is not supported by authority. (Brief in Oppos. p. 7) In fact, minimal scrutiny properly involves examination of any rational basis for the classification, whether enunciated or not. *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 462-63 (1988); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *United States Dep't of Agriculture v. Moreno*, 413 U.S. 527, 534 (1973).

summary disposition of the matter, including remand to the Washington Supreme Court for reconsideration of the equal protection issue.

DATED this 25th day of October, 1990.

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